IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.1291 OF 1996

Balwant Dattatraya Mule
residing at C-28, Deeplakshmi
Co-operative Housing Society,
Shashtri Nagar, Dombivli (W),
Dist: Thane .. Appellant
(Original Plaintiff)

vs.

1. Pandharinath Ganesh Nimkar
   C/o. Ramesh S. Bhagia,

2. Universal Estate Developers,
   A registered partnership firm,

3. Shri Ramesh Bhagia,
   partner,
   Universal Estate Developers

Address of 1 to 3
16 D, Bhagirathi Bhavan,
Dadar Galli, Off Chitale Path,
Behind Portugese Church,
Dadar, Bombay 400 028

4. Smt. Manorama D. Mule
   res. at Room No.19,
   Vinayak Bhavan, Chitale Path,
   Behind Portugese Church,
   Dadar, Mumbai 28. .. Respondents

Mr.V.K. Pradhan for the Appellant.

Ms. Geeta Shashtri for the Respondent.

CORAM : A.S.OKA, J.

DATED : 2nd May, 2005.

ORAL JUDGMENT :

1. Parties were heard on 28th March, 2005 and 4th April, 2005 and the judgment was reserved and accordingly today the appeal is kept for dictation of the judgment.

2. The Appellant is the Original Plaintiff and the Respondents are the Original Defendants. By the impugned Judgment and Order, the learned trial Judge has passed an order directing return of the plaint filed by the Appellant for presentation to Small Causes Court at Bombay. The learned trial Judge passed the said Judgment and Order while deciding the preliminary issue of jurisdiction.

3. With a view to appreciate the submissions made by the Counsel appearing for the parties, it will be necessary to refer to the facts of the case. The Appellant claims to be a tenant in respect of the residential premises bearing Room No.15, Vinayak Bhavan, Chitale Path, Dadar, Mumbai. According to him the Respondent No.1 is the landlord. According to the case of the Appellant, the Respondent No.2 has taken the building in which the suit premises are situated for development. The Respondent No.3 is one of the partners of Respondent No.2. The Respondent No.4 is the daughter of the Appellant’s

father’s sister.

4. The case of the Appellant is that his father, deceased Dattatraya Balwant Muley was the tenant in respect of the suit premises. The father expired when the Appellant was about 5 to 6 years old. The Appellant’s father expired leaving behind Appellant, his mother and sister. The Appellant claims that he became tenant in respect of the suit premises after demise of his father. The case of the Appellant is that after his marriage he was residing in the suit premises and as the area of the suit premises was not adequate for the needs of the family, the Appellant acquired additional accommodation at Dombivli. After acquiring the said accommodation, the Appellant’s mother continued to stay in the suit premises. In the year 1980 the Appellants mother expired. After demise of his mother, the Appellant could not immediately shift to the suit premises due to various difficulties.

5. The Appellant received notice dated 1st March, 1984 from the husband of the Respondent No.4 alleging that the Appellant was the step son of his father. The Appellant replied to the said notice. In the year 1992, the Respondent No.1 executed

Development Agreement in favour of the Respondent No.2. Though Respondent No.2 entered into agreement with various tenants for providing them accommodation in the developed property, no such agreement was executed in favour of the Appellant. The case of the Appellant is that he learnt that such agreement was executed in favour of the Respondent No.4 by which the Respondent No.2 agreed to allot a new tenement on ownership basis. The case of the Appellant is that accordingly a flat has been given to Respondent No.4 on ownership basis in the newly constructed building. The case of the Appellant in the plaint is that he has become tenant in respect of the suit premises on demise of his father. The substantive prayer made in the suit is that the agreement executed for development by the Respondent No.1 excluding the Appellant as a tenant was bad and illegal. He prayed for declaration that agreement executed in favour of the Respondent No.4 was bad in law.

6. The learned Counsel appearing for the Appellant relied upon the decision of the Division Bench reported in 1977 Maharashtra Law Journal, page 792, (Rajaram Brindavan Upadhaya & Ors. v. Ramraj Raghunath Upadhaya & Ors.) He submitted that in view

of the said decision, the City Civil Court had jurisdiction to entertain and try the suit. He submitted that the decision of the learned Single Judge of this Court reported in AIR 1981 Bombay page 876 (C.J. Ghadiali & Others V/s. Z.B. Wadiwalla) cannot have any application and in any event the said decision is contrary to law laid down by the Division Bench of this Court in the case of Rajaram Vrindavan (Supra). He submitted that the Appellant is claiming the right to have a permanent accommodation in the developed building. He submitted that his suit was for declaration of title and therefore the suit could not have been filed in the Court having jurisdiction under Section 28 of the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947 (hereinafter referred to as the said Act of 1947). The learned Counsel appearing for the Respondent submitted that the decision of the Division Bench in the case of Rajaram Vrindavan (Supra) will have no application as in the year 1978 there was a substantive amendment to the provisions of Section 5(11)(c) of the said Act of 1947. The learned Counsel further submitted that in substance the issue to be decided in the suit was regarding acquisition of tenancy under Section 5(11)(c) of the said Act of 1947. The learned Counsel therefore

submitted that no interference was called for with the impugned Judgment and Order.

7. I have considered the rival submissions. It will be necessary to refer to the decision of the Division Bench in the case of Rajaram Vrindavan. In the said decision of the Division Bench the question which arose for consideration is formulated in the first paragraph of the decision. The question of law which was formulated was whether the provisions of Section 5(11)(c) of the said Act of 1947 are meant to supersede the right of inheritance to the tenancy vesting in the heirs on the death of the tenant under the personal law. Thus, issue of jurisdiction was not the real issue before the Division Bench. In paragraph No.20 of the decision, the Division Bench has noted the submission made by the Advocate appearing for one of the parties that suit was cognizable under Section 28 of the act of 1947. In the facts of the case before the Division Bench one Vrindavan was the tenant of the suit premises. The said Vrindavan died in the year 1961 leaving behind original Plaintiffs and Respondent Nos.1 to 3. The case of the Defendant No.1 i.e. the son of Vrindavan in the suit was that he was staying with the deceased Vrindavan in the suit room

at the time of the death of deceased Vrindavan. The case of the Plaintiffs was that they are the tenants in respect of the suit room as they were the legal heirs of the original tenant.

8. In paragraph No.21 of the decision the Apex Court has held thus :

> "We are unable to see how the plaintiffs' suit can be of the nature mentioned in section 28 of the Rent Act. Section 28 provides what kinds of suits, proceedings or applications can be entertained and tried by the court having special jurisdiction under the Rent Act. If we make an analysis of the section, the following kinds of suits, proceedings or applications can be entertained, tried or dealt with by the Special Court under the Rent Act :-
>
> (1) a suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of a premises;
>
> (2) a suit or proceeding between a licensor and a licensee relating to the recovery of the licence fee or charge;
>
> (3) an application made under the Rent Act; and
>
> (4) a claim made or question raised arising out of the Rent Act or any of its provisions.
>
> It will be seen that the plaintiffs' present suit does not fall in any of the categories mentioned in section 28 of the Rent act, which fall within the exclusive jurisdiction of the Special Court created under the Rent Act. Although the plaintiffs are claiming to be the tenants, that is only a description of their title. But their suit

> is still based on title and such a suit does not fall in any of the categories of the matters that can be tried by the Special Court.

9. Section 5(11) of the said Act of 1947 was extensively amended in the year 1978. The amended clause (c) of Section 5(11) reads thus:

> "(c)(i) in relation to any premises let for residence, when the tenant dies whether the death has occurred before or after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1978 any member of the tenant's family residing with the tenant at the time of his death or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court;
>
> (ii) in relation to any premises let for the purposes of education, business, trade or storage, when the tenant dies, whether the death has occurred before or after the commencement of the said act, any member of the tenant's family using the premises for the purposes of education of carrying on business, trade or storage in the premises, with the tenant at the time of his death, or, in the absence of such member any heir of the deceased tenant, as may be decided in default of agreement by the Court."

sub clause (i) of Clause (c) contemplates that in case of default of agreement between the members of the family of the deceased tenant, the succession to tenancy right is to be decided by the Court. Section 28 of the said Act of 1947 provides that apart from entertaining suits and proceeding between

landlord and tenant relating to recovery of rent or the possession, the Court under Section 28 has exclusive jurisdiction to decide any application made under this Act and to deal with any claim or question arising out of the Act. It is to be noted here that Rule 2 (b) of the Bombay Rents, Hotel and Lodging House Rates Control Rule, 1948 contemplates a Miscellaneous application being made by a member of the tenant's family under sub clause (c) of Clause (ii) of Section 5 of the said Act of 1947.

9. It will be necessary to refer to the decision of the Single Judge of this Court in the case of Hadiyali (Supra). The learned Single Judge referred to the decision of the Division Bench in the case of Rajaram Vrindavan. The learned Single Judge extensively referred to change in law brought about by amendment of the year 1978. In paragraph 14 and 15 the learned Single Judge has held thus :

> "14. It is obvious that the provisions of section 5 (11)(c) of the Rent Act provides for a right of succession different from the one under the ordinary law. It must, therefore, follow that the right of possession also will be of the person who is a tenant under section 5 (11(c). In the circumstances, even if the plaintiff may be entitled to tenancy rights as an heir of Soonabai under the ordinary law, she will have no right of possession, in any case

right to immediate possession. No doubt, Bombay Rent Act is a statute which is supposed to be enacted as a temporary measure and so, it was not enacted to last till repealed but for a limited period which is being extended from time to time. It would therefore, appear that the mode of succession provided by the Rent Act is not a permanent mode and the right of the heirs or legal representative, under the normal law is suspended and of the heirs or legal representative, under the normal law is suspended and colipsed till the preferential right conferred by section 5 (11)(c) to tenancy continues. Hence, at the time of the filing of the suit and even at present, it cannot be said that the plaintiff as an heir had a right to the tenancy of or to occupy block C. Her claim can only be to recognition as a tenant under section 5 (11)(c) and to occupation alone or jointly with others under the provisions of Rent Act. It is held by this Court that only one person can be recognised as a tenant under section 5 (11)(c). However, it is not decided that all other persons who were already staying in the premises will have to go out. I do not think that the intention of the Legislature was to protect the possession of only one of the members of the tenant's family of to give a right of protected possession only to one of the heirs. This question will have to be considered when it arises.

15. Whether the plaintiff is a tenant under section 5 (11)(c) is a question which cannot be decided by the City Civil Court and hence by this Court sitting in appeal from a decree in a suit filed in the City Civil Court. Prayer (el) which is the real substantial prayer in the plaint, cannot be granted in view of section 5 (11)(c), in the sense that it includes a right to enter and enjoy premises. In the circumstances the judgment and decree of the learned trial Judge is liable to be set aside."

The issue of jurisdiction did not fall for

consideration of the Division Bench. After considering the subsequent amendment to the said Act of 1947, the learned Single Judge held that the question whether the Plaintiff was a tenant by virtue of Section 5(11)(c) cannot be decided by the City Civil Court.

10. In the facts of the present case, the real dispute is regarding acquisition of tenancy rights on the demise of the father of the Appellant who was the original tenant. Even according to the averments made in the plaint, the developer entered into agreement in favour of Respondent No.4 as according to the Developer, the Respondent No.4 was entitled to tenancy in respect of the said premises. The learned trial Judge was therefore right in holding that the real issue involved in the suit is regarding entitlement of the parties to claim of tenancy under Section 5(11)(c) of the said Act of 1947. Law laid down by this Court in the case of C.J. Gahdiyali & Ors. (Supra) is that such a suit is not maintainable in the Civil Court and the suit is covered by exclusive jurisdiction of the Court under Section 28 of the said Act of 1947. The learned trial Judge has therefore followed the view taken by the learned Single Judge and has ordered

return of plaint.

11. In view of clear pronouncement of law by learned Single Judge of this Court in the case of C.J.Gahdiyali and Ors (Supra), I find no fault with the order impugned in this appeal. At this stage it will be necessary to refer to a decision of the Apex Court reported in 73 Bombay Law Reporter, page 320, Sushila K. Dhonde v. Harilal G. Bhogani. The Apex Court held that claim or question arising out the said Act of 1947 or any of its provisions need not necessarily be one between landlord and the tenant but nevertheless the Special Court under Section 28 of the said Act of 1947 will have jurisdiction to deal with such a claim or question under Section 28(1) of the said Act of 1947. In view of this position, there is no error in the impugned Judgment and Order.

. The Appeal fails and is dismissed with no order as to costs.

(A.S.Oka, J.)